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FCC Public Forum on Rights-of-way Issues

The Jurisdictional Question: Local vs. Federal Authority

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of-way charges to the amount necessary for the locality to recover its costs of administering the rights-of-way.'

9. These state laws have been helpful in providing a degree of certainty to telecom carriers contemplating substantial investments, but they do not displace the need for the **FCC** to exercise its authority to establish national standards setting the proper boundaries for right-of-way regulation. And when the **FCC** does exercise its authority, the **FCC** should provide a clear statement that eliminates the need to litigate this issue repeatedly in different courts across the country — **thus** bringing much-needed certainty and predictability to the industry.

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1 47 U.S.C. § 253.

2 47 U.S.C. § 253(a).

3 Id. § 253(c)

4 *TCG* New *York, Inc. v. City of White Plains,* **Nos.** 01-7213(L), 01-7255(XAP), 2002 WL **31045144** (2d Cir. Sept. 12,2002).

5 47 U.S.C. § 253(d).

6 The FCC already has provided some guidance in interpreting the scope of subsection (c)'s safe harbor for legal requirements that "manage the public rights-of-way." In the ***TCI Cablevision*** of ***Oakland County*** and ***Classic Telephone*** orders, the FCC provided valuable guidance to courts in determining what is appropriate management of rights-of-way. ***In*** re ***TCI Cublevision of Oakland County, Inc.***, 12 FCC Rcd 21396 (1997); ***In*** re ***Classic Telephone, Inc.,*** 11 FCC Rcd 13082 (1996). The Ninth Circuit, **as** well **as** numerous district **courts,** have relied on these FCC decisions to determine whether local regulations are properly related to management of the rights-of-way. ***See City*** of ***Auburn v. Qwest Corp.***, 260 F.3d 1160, 1177 (9th Cir. 2001). But the FCC bas yet to grapple directly with the panoply of rights-of-way issues in a decision analyzing the reach of subsection 253(c).

7 ***See*** Minn. Stat. §§ 237.162(9), 237.163; Ind. Code § **8-1-2-101(b);** Col. Rev. Stat. § 38-5.5-107(1)(b); Mich. St. § 484.2253.

1. Historically, jurisdiction to regulate the rights-of-way has vested in local and, to some degree, state governments. The Telecommunications Act of **1996** — and section 253' in particular — does not seek to usurp local governments' jurisdiction over the rights-of-way and transfer it to the federal government. Local governments remain responsible for regulating and managing the rights-of-way.

2. On the other hand, the **1996** Act in many respects seeks to balance respect for traditional **areas** of local regulation with the recognition by Congress that there is a national interest in ensuring the development of competition in *all* telecommunications markets — including local markets — and that some degree of federal oversight is required to ensure the realization of that national goal.

3. Section 253 preserves local jurisdiction over rights-of-way, but with federal oversight. The language of section 253 clearly indicates that Congress understood that such authority, if exercised overbroadly, could threaten the national policy of encouraging competition and promoting deployment of facilities. Section 253 accordingly seeks to define the appropriate balance.

    - Thus, reflecting the congressional policy of eliminating barriers to the development of competition, subsection 253(a) bars state and local legal requirements that "prohibit or have the effect of prohibiting" the provision of telecom services.'

requirements are consistent with, or violate, section 253. A less definitive, less time-consuming approach would be for the FCC to provide some type of policy statement. The FCC could also provide guidance through decisions on petitions! In the *TCG/White Plains* case in the Second Circuit, the FCC filed an amicus brief. All of these approaches of course have unique advantages and disadvantages. Certainly the first — a formal interpretation setting forth the boundaries of permissible rights-of-way regulation to which local governments would have to adhere to avoid a presumption of preemption — would provide the clearest statement of the permissible scope of right-of-way regulation and would best satisfy Congress' goal of having the FCC guide the development of local competition and police measures that would interfere with such competition.

8. The absence of clear action by the FCC, particularly on the limits of "fair and reasonable compensation," has led carriers to look to state government to define the appropriate limits of local authority. The states have had to assume the responsibility for protecting competition that Congress specifically directed the FCC to assume in section 253. The states have in many cases proved that they can and will assume that responsibility with respect to limiting abuses of right-of-way authority that threaten to distort the costs of deploying telecom facilities.

- In many states, local authority over the rights-of-way is either delegated by the state, or can be limited by the state. Thus, several states have adopted laws that limit local authority to extract compensation for use of the rights-of-way and define the limits of appropriate rights-of-way management. For example, states such as Minnesota, Indiana, Colorado, and Michigan all have limited local right-

- Subsection 253(c) creates a safe harbor from the reach of subsection 253(a) for state and local laws governing use of the public rights-of-way. While that safe harbor is designed to preserve traditional local jurisdiction over rights-of-way issues, it is narrow: A local right-of-way regulation falls within the safe harbor only if it actually relates to "manage[ment of] the public rights-of-way" or recovers "fair and reasonable compensation" for use of the rights-of-way — and it must do so on a competitively neutral and nondiscriminatory basis?

4. There has been significant debate about precisely what these limitations in subsection 253(c) mean, and who should define them and enforce them. While the cities, in particular, have suggested a very broad reading of subsection 253(c) and a narrow reading of subsections (a) and (d), what should guide the interpretation and application of the whole of section 253 is the overarching purpose of the 1996 Act: the development of telecommunications competition and the deployment of a robust, *national* telecommunications infrastructure. The entire 1996 Act is an effort to achieve that goal and give the **FCC** more authority to guide that process. Section 253 must be read consistently with that theme, not as an isolated exception from it. Section 253 gives the **FCC** authority to preempt most local barriers to competition, while providing local governments with a well defined and limited carve-out from that authority. But this safe harbor should not be construed to eviscerate the **FCC's** authority to eliminate barriers to entry.

5. Of course, the **FCC** has been somewhat reluctant, especially of late, to exercise its full authority under section 253, in part because of a concern that it may be treading on areas of traditional local jurisdiction. But the **FCC's** jurisdiction to interpret and enforce

necessary authority to determine whether the subsection 253(c) safe harbor defense will or will not apply.

- Moreover, any interpretation of section 253 that did not give the **FCC** full preemption authority under subsection 253(a) would be in considerable tension with the Act's recognition that the **FCC** must play a key role in overseeing and determining the means of promoting competition and deployment of telecommunications facilities and services, notwithstanding the preservation of some local control.

7. Another key question is ***how*** should the **FCC** meaningfully exercise its jurisdiction under section 253 to limit abusive and over-reaching local right-of-way requirements — and when should it do so.

   - As to latter question, the answer is now. Numerous local governments have adopted ordinances that impair or interfere with the ability of telecommunications providers to deploy facilities and provide service. There is little question that in lean economic times, some local governments see telecommunications companies that operate — or sometimes just pass through — their territories **as** a captive source of revenue. The resulting patchwork of right-of-way regulations increases costs and creates substantial uncertainty about when, or even if, a company will be able to deploy facilities. There is a strong need for national oversight and some defining principles.

   - As to how the **FCC** should act: There are several avenues. The most definitive would be a formal rulemaking interpreting what types of right-of-way

section 253 is no different from the FCC's dictating the pricing methodology that now guides local wireline competition. In both cases Congress indicated that the FCC was to be the ultimate arbiter of what was necessary to remove barriers and ease the way to competition. In neither case did Congress suggest that all local authority be entirely usurped. Here, just as the FCC has done in implementing other sections of the Act, the FCC can and should act to establish guiding principles — either through targeted preemption actions or the issuance of regulations or guidelines — that ensure that local governments do not and cannot interfere with the development of a robust national telecom infrastructure.

6. As noted above, some have suggested that the FCC's jurisdiction to accomplish this may be limited. These questions about the FCC's jurisdiction arise from the peculiar construction of section 253.

   - Subsection 253(d) provides that the FCC "shall preempt" any state or local legal law that "violates subsection (a) or (b)." With respect to subsection 253(a), this makes perfect sense — subsection (a) bars state and local requirements that "prohibit or have the effect of prohibiting" the provision of service. Thus, subsection (d) requires the FCC to preempt laws violate subsection (a) by prohibiting or having the effect of prohibiting the provision of service. But the language of subsection 253(d) makes less sense with respect to subsection (b). Subsection (b) is simply a safe harbor that provides a defense to violations of subsection (a). It shields state universal service and consumer protection requirements that otherwise would be barred by subsection 253(a). It is far from clear how a state could, in the words of subsection (d), "violate" subsection (b).

- But what is most interesting for the purposes of this panel is that subsection (d) does *not* mention subsection (c), which, like subsection (b), is a safe harbor for certain legal requirements. Some have tried to read this omission as a limit on the FCC's authority to preempt local requirements that local governments assert are related to the rights-of-way. Supporters of that viewpoint suggest that section 253's legislative history shows that Congress intended that challenges to requirements that involve management of the rights-of-way be brought in local federal district courts. not before the FCC.

- But, as the Second Circuit recently affirmed in the *TCG-White* Plains case,[4] this narrow reading of the FCC's preemption authority under subsection 253(d) is implausible. Congress gave the FCC explicit authority to preempt laws that violate subsection 253(a). Indeed the provisions of subsection 253(d) are mandatory: the FCC "shall" preempt laws that violate subsection 253(a).[5] A rule that divests the FCC of jurisdiction to preempt merely because a local government asserts a defense under subsection (c) would make no sense. It would severely limit the FCC's ability to ensure that local requirements do not impede the development of competition and the deployment of telecom facilities. Thus, it may be the case that subsection 253(d)'s reference to preemption under subsection (b) raises some ambiguities as to whether subsection (b) does actually impose its own substantive obligations and limitations. However, there can be no question that subsection (d)'s reference to the FCC's authority to preempt violations of subsection 253(a), standing alone, is sufficient to include the